BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES K. STOUT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,010,002
DOLESE BROTHERS COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge John D. Clark dated August 14, 2003. Respondent contends claimant failed to prove that he suffered accidental injury arising out of and in the course of his employment to his right upper extremity and also that he failed to provide timely notice of the alleged accident.

Claimant contends he advised respondent's operations superintendent and general manager of his upper extremity complaints which he developed while working as a mechanic for respondent.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment on the dates alleged?

(2) Did claimant provide timely notice of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, The Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant started as a truck driver with respondent in September of 2001. Shortly thereafter, he changed to mechanic and continued in that capacity through the date of the preliminary hearing. Claimant began noticing right arm problems in approximately January

or February of 2003, with the E-1 alleging a series of accidents beginning January of 2003 and continuing.

Claimant testified that he told David Pauls, his supervisor (the operations superintendent for respondent), of his right arm difficulties, describing pain between the elbow and wrist in his right arm. He testified that Mr. Pauls was busy and did not refer him to a doctor. Claimant then proceeded to his own physician, Michael M. Vesali, M.D. He was contacted shortly after by Michael W. Shuck, D.O., an associate of Dr. Vesali, and advised that he needed to see a surgeon. The EMG nerve conduction studies performed on claimant on March 11, 2003, indicated right median entrapment neuropathy at the wrist, with the ultimate diagnosis being right upper extremity carpal tunnel syndrome. Both Dr. Vesali and Dr. Shuck recommended claimant be referred to a surgeon for a carpal tunnel release.

Respondent contends that when claimant first talked to Mr. Pauls about his upper extremity, claimant referred to it in terms of a non-work-related incident which he first noticed waking up sometime in January 2003. Mr. Pauls testified that claimant on more than one occasion, denied a work-related connection. However, the specific language used by claimant to Mr. Pauls was that there was "nothing that he could point to" regarding the actual cause of his symptoms.

Mr. Pauls acknowledged that by the end of March 2003, claimant had advised the general manager for the Kansas division, Steve Bowen, that he was having difficulties with his right upper extremity and he was filing a workers' compensation claim. This was shortly after claimant was advised that surgery would be likely.

Respondent contends that claimant only converted this to a workers' compensation claim after realizing that he was going to have to undergo surgery and the expense could be significant.

After respondent was advised of claimant's complaints, claimant was placed on light duty, picking up trash and painting with his left hand only. This job modification occurred shortly after claimant advised respondent of his problems and the fact that they were work related. Until that point, claimant was working his regular job.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

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[1] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[2]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[3]

Respondent argues that claimant's first conversation with respondent's representatives regarding the arm gave no indication that it was a work-related condition, but that claimant, instead, awoke with arm symptoms after possibly sleeping on it wrong.

Claimant, in describing his job duties, discussed using numerous hand tools, including wrenches, rachets, hammers, screwdrivers, pry bars and air tools. Claimant described the symptoms as occurring daily. Respondent contends that claimant's symptoms are not work related as claimant would occasionally use a computer at home. While claimant described his home computer use as sporadic, respondent's representative, Mr. Pauls, stated that at one time, claimant informed him that he had been on the computer "all day."

In reviewing the evidence, the Board finds claimant has proven by a preponderance of the evidence, that he suffered accidental injury through a series of accidents, culminating in late March or early April 2003, when claimant was shifted from his regular job to a light-duty position.[4] The Administrative Law Judge found claimant's date of accident to be August 2003, but with claimant on light duty, there is no evidence at this time to support an ongoing aggravation beyond the time of claimant's job modification. The Board finds claimant has proven accidental injury arising out of and in the course of his employment.

K.S.A. 44-520 obligates that a claimant provide notice to the respondent within 10 days of the date of accident. Here, the accident is a series of microtraumas rather than a specific traumatic incident. Notice at any time during the ongoing aggravation constitutes notice sufficient to satisfy K.S.A. 44-520. The Board, therefore, finds claimant's conversation with Mr. Bowen in late March 2003 would be notice of an accidental injury

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[2] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[4] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

within 10 days of the date of accident as required by statute. The Board, therefore, finds claimant provided notice to respondent in a timely fashion.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated August 14, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Director